No. 15945

In the United States Court of Appeals for the Ninth Circuit

ALBERT GERSTEN, MYRON P. BECK AND ANN H. BECK, MILTON GERSTEN AND MARY GERSTEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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CITATIONS

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 61-94) is reported at 28 T.C. 756.

JURISDICTION

These appeals involve income tax for the year 1950 and are taken by five individual taxpayers from three decisions by the Tax Court entered on October 30, 1957. (R. 95-97.) Each decision was entered in a separate proceeding but the three proceedings as

well as several others not involved here, were consolidated for hearing by the Tax Court. (R. 61-62.) The taxpayers received notices of deficiencies dated August 24, 1953, and within ninety days thereafter filed petitions for redetermination of such deficiencies with the Tax Court pursuant to Section 272(a) of the Internal Revenue Code of 1939. (R. 7-19, 27-39, 47-54.) Shortly thereafter answers thereto were filed for the Commissioner (R. 25-27, 45-47, 59-61) and, after hearing, the Tax Court rendered its decisions (R. 95-97). Then within three months, i.e., on January 24, 1958, three petitions for review were filed by the taxpayers. (R. 98-104.) Jurisdiction of this Court is invoked under Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Rights under contracts with the San Gabriel Valley Water Company were assigned and distributed to the taxpayers upon the dissolution and liquidation in 1950 of certain corporations of which they were stockholders. The question is whether the Tax Court correctly held that the contracts had a fair market value when distributed and, if so, whether each taxpayer must report on his 1950 return his share of the fair market value of the contracts as part of the capital gain realized from the liquidation of the corporations.

2. Whether the taxpayer Albert Gersten and his alleged second wife were entitled to file a joint return for 1950 as husband and wife under Section 51(b) of the Internal Revenue Code of 1939.

STATUTES AND RULING INVOLVED

The pertinent provisions of the statutes and ruling appear in the Appendix, *infra.*

STATEMENT

The facts so far as pertinent to the two issues [1] involved in this appeal and as found by the Tax Court are as follows (R. 68-80):

The individual taxpayers [2] involved here kept their books and reported their income on a cash basis. (R. 69.)

Facts Relative To The First Issue On Appeal

From July, 1947, until the end of 1950 taxpayers Albert Gersten and Myron P. Beck were the controlling stockholders of the four corporations involved herein [i.e., J. Richard Company, Rex Land Company, Whittier Development Company, and Lawrence Land Company]. Milton Gersten also held stock in the last two companies. These corporations were engaged in the business of subdividing tracts of land, constructing houses thereon, and selling such houses. (R. 69.)

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[1] The first issue before the Tax Court was decided for the taxpayers (R. 80-82) and was not appealed by the Government. The other four issues were decided for the Government but the taxpayers have not included the third and fifth issues in their appeal. (R. 84-87, 91-94.)

[2] Ann H. Beck and Mary Gersten are involved in these appeals solely because they filed joint income returns with their husbands, Myron P. Beck and Milton Gersten, respectively. Consequently, in discussing the activities of the taxpayers here, we shall be referring to the other three taxpayers.

The extension of pipelines for water service was essential to the subdivision of the tracts and the sale of the houses constructed thereon. In order to provide water facilities for the subdivisions, contracts were entered into with the San Gabriel Valley Water Company, which agreed to extend its waterlines into the subdivisions upon payment by the subdividing corporations of the cost of such extensions. San Gabriel was a California water utility corporation, subject to the jurisdiction of the Public Utilities Commission of the State of California, and held a franchise to operate in the area in which the tracts in question were located. Its minimum rate for water during 1948, 1949, and 1950 was $1.25 per month. (R. 69.)

Under the contracts, San Gabriel was to make payments to the subdividing corporations on the basis of its gross receipts from the sale of water to homes in the particular subdivision. These payments were to be made for a period of ten years from the date the lines were completed, unless the full amount should be paid prior to the end of such ten-year period. Thus it was possible that a subdividing corporation might not receive repayment in full. The corporations did not hold title to the facilities. (R. 70.)

The four corporations were all dissolved by December 31, 1950. Substantial amounts of their payments to San Gabriel remained unpaid at the time of their dissolution, and such contracts, which were fully transferable, were assigned to their stockholders along with all of the other corporate assets. (R. 70)

Contracts similar to those here have been bought and sold. Under normal conditions, a return of ap-

proximately 70 per cent of the original payment might be expected on such contracts. Some of the conditions which affected the amount which might be refunded were: (1) the time in which all houses within a subdivision were completed; (2) the time within which the houses, once completed, were sold and occupied; and (3) the amount of water the consumers used, which in turn was dependent on such factors as the number of water-consuming appliances owned by them, weather conditions during the year, and the amount of plantings and vegetation needing irrigation. (R. 70.)

Upon the dissolution of the corporations, Albert Gersten, Myron P. Beck, and Milton Gersten did not assign any value to their respective interests in the water contracts in arriving at the gain they realized upon liquidation of the corporations. The Commissioner determined that each of the contracts did have a fair market value when they were received by the stockholders in liquidation, and on the basis thereof increased the amount of capital gain realized in his determination of deficiencies herein. (R. 71.)

Details of the contract which each corporation entered into with San Gabriel, and the manner in which such contracts were treated for tax purposes by the transferees of the corporate assets, were as follows:

(1) The J. Richard Company, hereinafter referred to as Richard, was a California corporation, incorporated on July 10, 1947, and dissolved about June 22, 1950. Richard's stock was owned equally by Albert Gersten and Myron P. Beck. During the course of its existence, Richard acquired three tracts

of land which it subdivided into lots on which it constructed and sold houses. On December 3, 1947, a contract was made with San Gabriel providing for the installation of waterlines on two of the tracts. San Gabriel completed the installation of these waterlines on April 2, 1948. The contract required Richard to pay San Gabriel $23,764, and San Gabriel agreed to repay such payment "in the amount of ⅓ of the gross revenues derived from sale of water to occupants of said subdivisions for a period not to exceed 10 years from date hereof." (R. 71-72.)

On December 2, 1948, a similar contract was made with San Gabriel to provide water facilities for the third tract. The second contract required a payment of $15,258, and San Gabriel agreed to repay such payment in the amount of one-third of the gross revenue derived from the sale of water for a period not exceeding ten years from the date of the contract. (R. 72.)

At the time of Richard's dissolution, on June 22, 1950, San Gabriel had repaid $2,325.37 on the first contract covering the first two tracts, and $1,277.69 on the second contract covering the third tract. All of the houses constructed by Richard on the first two tracts were sold by June 1, 1949, and all of the houses constructed by it on the third tract were sold by February 3, 1950. (R. 72.)

Upon the dissolution of Richard on June 22, 1950, Albert Gersten and Myron P. Beck were each paid cash in the amount of $38,202.12, and received a 50 per cent interest in the contracts with San Gabriel. They did not assign any value to the interest received

in such contracts in computing the amount of capital gain realized on the dissolution of Richard. But the Commissioner determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on June 22, 1950, or $17,709.48. Accordingly he increased the amount of capital gain realized by Gersten and Beck on Richard's distribution of its assets to them. The contracts had a fair market value at the time of Richard's dissolution, equal, at least, to the amount determined by the Commissioner. (R. 73.)

(2) The Whittier Development Company, hereinafter referred to as Whittier, was a California corporation, incorporated on August 20, 1948, and dissolved on or about December 28, 1950. From February 28, 1950, to December 28, 1950, Albert Gersten and Myron P. Beck each owned 40 per cent of its stock and 20 per cent was owned by Milton Gersten. During its existence, Whittier acquired two parcels of land which it subdivided into lots and constructed houses thereon for sale. In order to provide water facilities for such tracts, it entered into two contracts with San Gabriel. In the first Whittier agreed to and did pay, on or about November 29, 1949, $23,841 to San Gabriel, and San Gabriel agreed to repay such payment within ten years from the date of the contract by payment of 35 per cent of the annual gross revenues derived from the sale of water. A few months later Whittier made a second contract with San Gabriel providing for the installation of water facilities to the other tract which it owned and under which it paid San Gabriel $5,214, and San

Gabriel agreed to repay such sum within a ten-year period from completion of the installation of the facilities, which was completed on April 14, 1950. Such repayment was to be made from 35 per cent of the gross revenues derived from the sale of water. By December 28, 1950, San Gabriel had repaid $1,413.02 on the first contract and $62.98 on the second. Whittier had sold all houses on the first tract by June 7, 1950, and on the second tract by December 15, 1950. (R. 73-74.)

Upon the dissolution of Whittier on December 28, 1950, Albert Gersten and Myron P. Beck each received the sum of $77,160.26 and a 40 per cent interest in each of Whittier's contracts with San Gabriel. Milton Gersten received the sum of $38,580.13 and a 20 per cent interest in such contracts. None assigned any value to the interest received in these contracts in computing the amount of capital gain realized on the dissolution of Whittier. The Commissioner determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on December 28, 1950, or $14,545.50. Accordingly he increased the amount of capital gain realized on Whittier's distribution of its assets to them. Such contracts had a fair market value at the time of Whittier's dissolution, equal, at least, to the amount determined by the Commissioner. (R. 75.)

(3) The Rex Land Company, hereinafter referred to as Rex, was a California corporation, incorporated on February 4, 1949, and dissolved on or about October 25, 1950. Its stock was equally owned by Al-

bert Gersten and Myron P. Beck. Rex acquired a tract of land which it subdivided into lots and on which it constructed and sold houses. On February 9, 1949, it entered into a contract with San Gabriel for the installation of waterlines to the tract. For the installation of such facilities, Rex agreed to and did pay to San Gabriel the sum $14,707.20, San Gabriel agreed to repay such payment within a ten-year period from the date on which installation of the facilities was completed, which was April 22, 1949. Such repayment was to be made from 35 per-cent of the gross revenues derived by it from the sale of water. By October 25, 1950, San Gabriel had re-paid $949.02 of such sum. All of the houses constructed on the tract were sold by March 16, 1950. (R. 75-76.)

Upon the dissolution of Rex on October 25, 1950, Albert Gersten and Myron P. Beck each received the sum of $1,158.84 in cash, a 50 per cent interest in certain real property having a fair market value of $215,350, and a 50 per cent interest in Rex's contract with San Gabriel. Neither assigned any value to the interest received in such contract in computing the amount of capital gain realized on the dissolution of Rex. But the Commissioner determined that the contract had a fair market value of 50 per cent of the amount which remained unpaid on October 25, 1950, or $7,132.68, and accordingly increased the amount of capital gain realized by them on Rex's dissolution. The contract had a fair market value at the time of Rex's dissolution equal, at least, to the amount determined by the Commissioner. (R. 76-77.)

(4) The Lawrence Land Company, hereinafter referred to as Lawrence, was a California corporation, incorporated on March 25, 1949, and dissolved on or about December 31, 1950. The stock of the corporation was owned by Albert Gersten, Myron P. Beck and Milton Gersten. Lawrence acquired a parcel of land which it subdivided into lots and constructed houses thereon. On January 26, 1950, it entered into a contract with San Gabriel for the installation of waterlines to the tract. Such contract was modified by a subsequent contract entered into on February 14, 1950. Under the contract, as modified, Lawrence agreed to and did pay to San Gabriel $31,-021 and San Gabriel agreed to repay such sum within a ten-year period from the date on which installation of the facilities was completed, which was March 29, 1950. Such repayment was to be made from 35 per cent of the gross revenue received from the sale of water to consumers. All of the houses which Lawrence constructed on the tract were completed and sold by December 11, 1950. No repayments were paid by San Gabriel to Lawrence prior to Lawrence's dissolution on December 31, 1950; but payments commenced to be made on March 1, 1951. (R. 77-78.)

On December 31, 1950, Lawrence distributed its assets which included in addition to cash and certain real estate its contract with San Gabriel. The interest of Albert Gersten in such contract was 40 per cent, the interest of Myron P. Beck was 50 per cent and that of Milton Gersten was 10 per cent. They did not assign any value to the interest received in such contract in computing the amount of capital

gain realized on the dissolution of Lawrence but the Commissioner determined that the contract had a fair market value of $15,301.96 on December 31, 1950. Accordingly he increased the amount of capital gain realized by them on Lawrence's distribution of its assets to them. Lawrence's contract with San Gabriel had a fair market value at the time of its dissolution, equal, at least, to the amount determined by the Commissioner. (R. 78-79.)

Facts Relating To The Second Issue On Appeal

On April 3, 1950, Mrs. Lucille Gersten obtained an interlocutory decree of divorce from Albert Gersten in an action filed in the Superior Court of the State of California in and for the County of Los Angeles. Then on November 2, 1950, the latter obtained a final decree of divorce form Lucille Gersten in the First Civil Court of the State of Chihuahua of the Republic of Mexico, sitting at Juarez. On the same date he married Bernice Anne Gersten in Juarez. The California interlocutory decree was not final on the date of the Mexican divorce and marriage. At all times during the year 1950, Albert Gersten and Bernice Anne Gersten were residents and domiciliaries of the State of California. (R. 80.)

The Commissioner determined that Albert Gersten was not legally married to Bernice and that they were not entitled to file a joint return as husband and wife as permitted by Section 51(b) of the 1939 Code. The Tax Court concluded that the Commissioner's determination was correct. (R. 87, 90-91.)

SUMMARY OF ARGUMENT

1. During the taxable year 1950, the corporations involved here were dissolved and their assets were distributed as liquidating dividends to the stockholders who are taxpayers here. Among such assets were certain contracts under which the corporations advanced the San Gabriel Valley Water Company the cost of water installations on the tracts which the corporations were subdividing and San Gabriel agreed to repay a named percentage of their gross revenues for a designated period. The Tax Court held that the San Gabriel contracts had a fair market value when the corporations were dissolved and that the taxpayers must report their respective shares of such contracts in the year when the liquidation occurred.

The Tax Court's decision is in accord with the statutory provisions stating that amounts distributed in liquidation are to be treated as in full payment for the corporate stock and that such amounts must be taxed in the year received to the extent of the "amount realized" which means cash plus the fair market value of any property (other than money) received.

It is well established that the question of whether property (such as the San Gabriel water contracts) had a fair market value is one of fact. Therefore this issue resolves itself into a determination of whether the evidence supports the Tax Court's ultimate conclusion, namely, that the Commissioner correctly determined that the fair market value of these contracts was fifty per cent of the amounts of the original outlay still unpaid at the time of liquidation. The Com-

missioner's determination is of course presumptively correct and the taxpayers had the burden of disproving its correctness but they made no attempt to do so. However, the evidence shows that the contracts all had from seven to ten years to run when the liquidation occurred, that there were a large number of householders in the area involved who would have to be customers of San Gabriel, and that the taxpayers could expect a fair amount of revenue from the contracts regularly. The evidence also shows that these contracts were transferable and that similar contracts had been bought and sold. We submit that the Tax Court's decision on this issue is correct.

2. Taxpayer Albert Gersten secured a divorce in Mexico in 1950 and was married there the same day. This occurred some months before the final divorce decree was entered in the suit which had been filed against him by his first wife in California. Notwithstanding the pendency of the California divorce suit Albert and his alleged second wife filed a joint tax return for the year 1950, but the Commissioner refused to accept it on the ground that the privilege of filing joint returns has been granted only to those persons who are "husband and wife" and that these persons were not legally married under California law. This determination was approved by the Tax Court and is in accord with decisions of this Court and also gives the correct interpretation of California law as set forth in specific statutory provisions and in many California decisions.

ARGUMENT

I

The Tax Court Correctly Held That The San Gabriel Contracts Which Were Included In The Liquidating Dividends Of The Dissolved Corporations Involved Here Had A Fair Market Value At The Time Of Liquidation And That The Stockholders-Taxpayers Should Report Their Respective Shares Of Such Contracts In The Year That The Liquidation Occurred

Taxpayers Albert Gersten and Myron P. Beck were the controlling stockholders in the four corporations involved here, and taxpayer Milton Gersten also had stock in two of these corporations. (R. 69.) All of these corporations were dissolved by the end of 1950, the taxable year, and their assets were also distributed in that year as liquidating dividends to their stockholders. Among such assets were the contracts which were made by the corporations with the San Gabriel Valley Water Company in order to get water installed on the tracts of land that they had acquired for subdivision and sale.[3] The treatment of these contracts constitutes the first issue here. As stated by the taxpayers (Br. 4-5) the question is whether the contracts had an ascertainable fair market value when the liquidation occurred and, if so, whether the taxpayers' respective shares of such contracts should be reported on their tax returns for 1950 when the distribution

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[3] All of the corporations also distributed cash and two of them distributed some land which the parties stipulated had a fair market value. (R. 109, 111, 114, 116-117.) The taxpayers have raised no objection to paying income tax on the cash or land in the year when the distributions were made to them.

was made. It is our position that both parts of that question must be answered in the affirmative and that was the substance of the Tax Court's decision. But we also wish to point out that in stating this issue, the Tax Court limited it to whether the contracts had a fair market value when the liquidation occurred. (R. 82.) The Tax Court's statement is, of course, correct for, as we shall point out, if property received upon a liquidation has a fair market value, a taxpayer may not legally postpone the reporting of any gain from the receipt of such property to a later year.

A. *Applicable statutory provisions*

Section 115(c) of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that amounts distributed in liquidation of a corporation shall be treated as in full payment in exchange for the stock, and that the gain or loss to the distributee shall be determined under Code Section 111, but shall be recognized only to the extent indicated in Code Section 112. Section 111(a) provides that gain from a sale or other disposition of property shall be the excess of the amount realized over the adjusted basis (which in this case would be cost) and Section 111(b) defines the term "amount realized" as being "the sum of any money received plus the fair market value of the property (other than money) received." (Appendix, *infra.*)

Thus, as indicated above, to determine how much of the amount realized is taxable we must turn to Section 112(a). (Appendix, *infra.*) That section sets forth the general rule as follows: *Upon a sale or ex-*

change, the entire amount of the gain or loss, as determined under section 111, shall be recognized. Several exceptions to this rule are listed but none are applicable here. Obviously in view of these clearly worded statutory provisions the taxpayers here were required to report for income tax purposes not only the cash received upon the liquidation of their corporations but also the receipt of any other property (such as the San Gabriel contracts) if such property had a fair market value when the exchange (i.e., liquidation) occurred.[4] In other words, as we have already indicated, this issue is really one of determining whether the contracts here had a fair market value when distributed and such a question has been repeatedly held to be a question of fact. Consequently it is our position that after the above statutory provisions are applied, the issue here is to be determined by the facts, and that the facts support the Tax Court's decision.

B. *Findings of fact which support the Tax Court's decision*

Before discussing the facts here, we wish to point out that the Commissioner determined that at the time of the liquidation all of the San Gabriel contracts had a fair market value of fifty per cent of the amounts remaining unpaid. For example, the J. Richard Company paid out $39,022 originally to San Gabriel for water installations and at the time of its dissolution

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[4] While the taxpayers are required to report the entire amount of gain realized by them upon the liquidation of the corporations here, such gain can be treated as capital gain but, as Commissioner has done so, we do not discuss the statutory provisions relative to capital gain.

San Gabriel had repaid $3,603.06. Thus the balance remaining to be paid on its contracts (if the full outlay should be recovered) was $35,418.94 but the Commissioner determined that the fair market value of such contracts at the time of liquidation was only fifty per cent of the latter figure or $17,709.48. (R. 73.) As to the figures for the other corporations see R. 72-78.

The Commissioner's determination was presumptively correct. That is, of course, too well established to require citation of authority. It is equally well established that the burden of proving the incorrectness of the Commissioner's determination was on the taxpayers but they have not met their burden. Indeed, as the record shows, they made no attempt at the trial to overturn the Commissioner's determination.[5] But the Tax Court found that each of the San Gabriel contracts had a fair market value at the time of the liquidation equal at least to that determined by the Commissioner. (R. 73, 75, 77, 79.) In regard to this finding the Tax Court said (R. 83-84):

> The evidence shows that each of the contracts did have a fair market value at the time the corporations were dissolved, and we have so found.

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[5] At the hearing, counsel for taxpayers admitted that if the Tax Court held certain cases relied on by taxpayers to be inapplicable (as it did) they would then be in the position of not having met their burden in connection with the presumption of correctness attaching to the Commissioner's determination. Counsel also admitted that taxpayers did not intend to put on any proof relative to the value of the contracts which were distributed at the time of liquidation. (R. 153.)

None of the contracts were as much as three years old at the time of distribution, and the payments under them had commenced on all except the Lawrence contract. They began on that one shortly thereafter. All houses had been completed and sold by the time each corporation dissolved. Expert witnesses testified that contracts, similar to those here, were bought and sold, and that one might expect to receive as much as 70 per cent of the total original payment of such similar contracts. There was testimony to the effect that a proposed freeway would cross the subdivision developed by Lawrence. No showing, however, was made that the plans for the freeway route were final, or, if adopted, the extent to which the occupancy of the houses within the area would be affected during the repayment period. Neither was there any showing that petitioners would or would not have a claim for compensation, if and when their rights to repayment might be destroyed as a result of the building of the freeway.

The record, in our opinion, amply sustains the respondent in his determination of fair market value, and we have so found in our findings of fact.

As counsel for taxpayers refers (Br. 20-23) to some of the statements of the Tax Court as erroneous inferences and criticises its ultimate conclusion as not well founded, we will now analyze the stipulation of facts and testimony which support the Tax Court's conclusion.

There were six San Gabriel contracts distributed by the dissolved corporations in 1950. One of these was three years old and so would expire near the end of

1957. Another expires on December 2, 1958, two others will expire in the spring of 1959, and two in the spring of 1960. (R. 107-108, 110, 113, 116.)[6] It was proper for the Tax Court to refer to the expiration dates for it is important that these contracts had periods of from seven to ten years to run at the time of liquidation. Certainly it can not be denied that in the length of time the contracts would be in effect considerable amounts could be expected as payments under the contracts.

There were of course some contingencies such as variations in weather, and these, as taxpayers contend, could make some difference in the use of water for watering plants and yards. But a very large part of the water used by householders is for drinking, bathing, laundering, cooking and other purposes within a house. Thus, as the latter uses are affected very little, if any, by changes in weather, they always furnish a fairly constant basis for revenue from the sale of water. But exterior uses of water can not be dismissed as inconsiderable. Regardless of what the weather may be, it is well known that in Southern California, where the homes here are located, all plants and lawns live and grow throughout the year and need a great deal of water. It is also a matter of common knowledge that in a nice residential section, as we may assume the area here to be, home owners take a great deal of pride in their premises and beautify them with many flowers and trees. Thus exterior uses

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[6] The stipulation gives the contract with the Rex Land Company as expiring April 22, 1949, but obviously that is a mistake. It should be 1959. (R. 74, 113.)

of water are also the basis for a considerable and fairly regular source of revenue from water sales.

We do not of course know how many people would be using water under contracts here, but we do know that the four corporations subdivided their tracts of land into 1078 lots and on 1065 of these that number of homes had been built and sold before their dissolution in 1950. (R. 105-106, 109-110, 112, 115.) Presumably most, if not all of these 1065 homes were occupied soon after they were sold, and it is reasonable to assume that most of them would continue to be occupied throughout the periods covered by the contracts here. At any rate, Mr. Moseley, vice president of San Gabriel, testified, that there was comparatively full occupancy from 1947 through 1950 in the area in which the tracts involved here are located, and that such condition continued thereafter. (R. 215-216.) Mr. Moseley's testimony was substantiated by the stipulation (R. 120) that during the years 1948, 1949 and 1950 there were substantially no vacant houses in the area involved here.

It was also stipulated that San Gabriel held a franchise for furnishing water in the area. (R. 120.) That of course means that San Gabriel was the only company which could sell water therein. Consequently, as water is one of the necessities of life and is used for many purposes, and as it is extremely unlikely that any one living in the area had a private source of water such as a well or cistern, it is evident that San Gabriel has had a regular and considerable amount of revenue from the 1065 homes sold by the dissolved corporations. It is also evident that since

San Gabriel was unconditionally obligated to pay over either one third or thirty-five per cent of its gross revenue from the area covered by contracts (R. 72-77), the taxpayers, as assignees of the contracts, could expect payments regularly from San Gabriel for the periods of the contracts. Even those customers of San Gabriel who might have used very little or no water have been required to pay a minimum rate, which in the years 1948 through 1950 was $1.25 per month. (R. 121.)

We submit that the above facts not only show that the San Gabriel contracts could be counted on as a regular source of income for the taxpayers but also indicate that the factors determining the amount of water bought from San Gabriel is sufficiently constant to furnish a reasonable basis for computing the fair market value of the contracts at the time of liquidation. There is also other evidence to support our statement. The parties here stipulated that the water contracts were transferable (R. 120), and Mr. Moseley (who counsel for taxpayers stated had been qualified as an expert (R. 191)) testified that he knew of four sales of contracts similar to those here (R. 177, 187-188). He also stated that it would be a conservative estimate to say that seventy per cent of the original outlay under these contracts would be repaid by his company. Then upon cross-examination he explained this further by stating that seventy per cent would be an average return on such contracts as some would pay off much less and some would pay off more. (R. 201-202.)

Mr. Mosely's testimony was substantiated by that of Camille A. Garnier, president and general manager of Suburban Water Systems, a private company similar to San Gabriel. (R. 218.) The latter testified that while it was difficult to predict the amount of refund which might be made on water deposit contracts like those here, such amount could be predicted. (R. 229.) He explained that when subdividers sold lots and the purchasers did not build residences on them for some years, the refunds to the subdividers might be as low as twenty to twenty-five per cent of the original outlay. But, upon being asked to contrast that situation with an area in which the houses have been built and sold promptly (as was true in this case), Mr. Garnier replied (R. 237-238):

> In the case of a subdivider that is going to build the houses at the same time that the mains are installed, the amount of money that would be returned of the total deposit would depend a great deal on the time that that installation was made, and as an average—again I am speaking as an average over let's say 10,000 services have been installed by our company in the last two or three years, which may not be applicable to this case, which was way prior, and where costs were different and everything else—*the refund will be anywhere from 65 percent to about 105, with an average of about 70 to 80, approximately very close with what Mr. Mosely said.* (Italics supplied.)

Mr. Garnier was asked how one could get a refund of 105 per cent and he stated that that was the way he construed a contract on which payments in full

had been made in about eight and a half years. He then reiterated that the demand for homes and the rate at which homes were selling were big factors in computing the amount of the repayments under such contracts. (R. 238-239.) Thus the witness clearly indicated that, when homes are built and sold promptly as in this case, the situation is very favorable for a large percentage of the original outlay to be repaid.

Mr. Garnier testified further that he and his sister had bought a water contract similar to those here, and that the Garnier Construction Company had also purchased such a contract. (R. 229-230.) Thus he substantiated the testimony of Mr. Mosely that contracts like those here not only can be bought and sold but that such sales have been made. Obviously such testimony by two experts in the field of water installations not only establishes the fact that contracts like the ones here do have an ascertainable fair market value but their testimony as to the average return which may be expected also shows that the Commissioner's determination of such value, being only fifty per cent of the unpaid balance, was a very reasonable one. Consequently the Tax Court was warranted in accepting the Commissioner's determination, particularly in the absence of any proof by the taxpayers indicating that such determination is incorrect.

C. *The cases on which taxpayers rely do not support their contention*

While taxpayers apparently admit, as they must, that the San Gabriel contracts had substantial value they contend that the contracts had no ascertainable

fair market value at the time that the corporations were dissolved. In support of such contention the taxpayers rely primarily on *Burnet* v. *Logan*, 283 U.S. 404; *Westover* v. *Smith*, 173 F. 2d 90 (C.A. 9th), and *Commissioner* v. *Carter*, 170 F. 2d 911 (C.A. 2d). In the *Logan* case, there was a sale of the stock of the Andrews and Hitchcock Company by the taxpayer therein and all of that company's other stockholders. The consideration was a named amount of cash plus a contractual right given by the purchaser to pay the sellers 60 cents a ton for any iron ore allotted to the purchaser as assignee under a prior agreement whereby the Mahoning Company (a producing company whose stock had been partly owned by Andrews and Hitchcock) promised to apportion any ore it extracted among its stockholders. But the lease under which the Mahoning company operated did not require it to produce either a maximum or minimum tonnage of ore or to make any definite payments. In discussing the consideration for the taxpayer's sale of stock, the Supreme Court said (p. 413) that she had received cash and "a promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty." Therefore it held that the promise to the taxpayer had no ascertainable fair market value and that the taxpayer, who had not recovered her capital investment prior to the taxable year, could properly demand the return of her capital before assessment of any taxable profit based on payments only conditionally promised.

Obviously the contingencies surrounding the prom-

ise in the *Logan* case differ materially from the facts here. As we have pointed out, the circumstances in this case were such that San Gabriel could always count on selling water to most, if not all, of the occupants of the 1065 homes involved here and, of course, San Gabriel had to be ready to sell water at all times for that was necessary in order to keep its franchise. Thus San Gabriel was assured, without any contracts with the home owners, that it would have gross income regularly from sales to such persons. Therefore despite some variations in revenue due to seasonal changes and other causes, San Gabriel could expect a fairly constant amount of gross income annually and, because it could, the fair market value of the taxpayers' contractual rights could be properly determined. Moreover, there is also evidence here that similar contract rights had been sold by other persons, and there was no similar evidence in the *Logan* case.

Westover v. *Smith*, *supra*, is also distinguishable on its facts. There the taxpayer received, as a stockholder, upon a corporate liquidation in 1940, cash and the right to receive ten per cent of the gross sales price of machinery to be manufactured and sold by another corporation. There was no obligation on the part of the latter either to manufacture or sell its machinery and, because of that contingency, the taxpayer and the Government agreed (as the record filed with this Court shows) that the contractual right which the taxpayer received had no ascertainable fair market value at the time of the 1940 liquidation. Thus in that case no question could be or

was raised either in the District Court or in this Court on appeal as to whether the taxpayer's right to payments had any ascertainable fair market value in 1940. Instead the question there, unlike that here, was whether the amounts paid to the taxpayer in 1941 and 1943, pursuant to her contractual rights, should be treated for income tax purposes as ordinary or capital gain in the subsequent years involved there. On that question this Court held that, since the contractual right had no ascertainable market value when the liquidation occurred in 1940, the transaction had not been closed and that receipts in later years should be taxed as capital gain. In reaching its conclusion this Court said (p. 91) that the value of the contract would doubtless have been computed as capital gain if it had been found to have an ascertainable market value at the time of the liquidation, and decided that the capital gain treatment should also be given to payments made in years subsequent to a liquidation if made pursuant to a contract whose value could not be ascertained at the time of liquidation.

As this Court pointed out in the *Westover* case (p. 92) the factual situation there is almost identical with that in *Commissioner* v. *Carter*, *supra*, and the question in both cases was also the same. It is also of course significant that in the *Carter* case the Government and the taxpayer involved there stipulated that the oil brokerage contracts which the latter received upon the liquidation had no ascertainable market value when distributed and a statement to that effect appears in the opinion (p. 911). But

in this case the parties have not made such stipulation. Instead the Commissioner has determined that the contractual rights did have a fair market value at the time of liquidation, and the taxpayers have offered no evidence to disprove the figure determined by the Commissioner and adopted by the Tax Court. Consequently, the cases on which taxpayers primarily rely are distinguishable.

Taxpayers also cite a number of cases in footnotes numbered 12 through 17 (Br. 16) but, as they point out that these cases are cited because they apply the principle of the *Logan* case, we do not think it necessary to discuss them individually. What we have already said answers any contention which can be made as to such cases, since it indicates that the question here is primarily one of fact and that each case must be judged by its own facts. Of course if a case involves facts similar to those in the *Logan* case or the *Westover* case, then it may be assumed that the contingent factors will be too great to permit any finding of a fair market value for the property right involved. But those cases do not hold that the mere presence of a contingent factor will prevent such a valuation. Most cases do have some contingent elements; yet proper estimates may properly be made if there are other definite and established factors indicating a reasonable value. At any rate, in this case the Commissioner and the Tax Court have found that a fair market value could be determined and their determination is supported by substantial evidence. In *Bradford* v. *Commissioner*, 22 T.C. 1057 (decided before the instant case), and *Lentz* v.

Commissioner, 28 T.C. 1157 (decided shortly after this case), the Tax Court made specific findings that in view of the contingent elements in those cases no fair market value was ascertainable. Because the question is largely, if not wholly, one of fact, taxpayers are not warranted in relying on those cases or in citing them to show inconsistency in the Tax Court's decisions.

D. *Taxpayers must report gain from contractual rights in the year received*

Taxpayers also argue that even if it be assumed that the San Gabriel contracts did have a fair market value they were not required to report any gain therefrom until payments thereunder were actually received by them because they were all on the cash basis. We do not agree and neither did the Tax Court.

In this connection, taxpayers cite *Kasper* v. *Banek*, 214 F. 2d 125 (C. A. 8th); *Amend* v. *Commissioner*, 13 T.C. 178, and Rev Rul. 58-162, 1958-15 Int. Rev. Bull. 12, but these authorities discuss constructive receipt of income and do not support taxpayers' contention. The situation described in each is similar in that each refers to a farmer, who is on a cash basis, and who has agreed toward the end of a named year to sell his wheat but has made a contract which calls for delivery as well as payment early in the subsequent year. They hold that the gain realized from the sale of the wheat is not taxable until the later year and that the principle of constructive receipt would not apply there because the farmer had no

right to any payment until the wheat was delivered in the year following his agreement to sell. But we do not have a comparable situation here and there has been no attempt on the part of the Commissioner or the Tax Court to tax any gain which has been only constructively received. In this case, the taxpayers received, in addition to cash, contractual rights which they admit has value but which they deny had fair market value at the time of the liquidation. As the Tax Court determined otherwise, it properly held that the fair market value of the contracts must be included in computing the gain the taxpayers realized from their liquidating dividends.

II

The Tax Court Correctly Held That The Taxpayer Albert Gersten Was Not Entitled To File A Joint Income Tax Return For 1950 With His Alleged Wife Bernice Ann Gersten

At the beginning of the taxable year 1950, Albert Gersten was married to Lucille Gersten. On April 3, 1950, the latter obtained an interlocutory decree of divorce in an action filed in the Superior Court of California for the County of Los Angeles. Before that decree became final, Albert went to Mexico where he obtained a divorce from Lucille on November 2, 1950, and on the same day married again. He and his alleged second wife (Bernice Ann Gersten) were at all times throughout 1950 residents and domiciliaries of California. Albert and Bernice later filed a join income tax return for 1950 but the Commissioner refused to accept it as such because he determined

that under the law of California Albert was not legally married to Bernice. (R. 21, 68, 80, 87.) The Commissioner determined that Albert and Bernice were not entitled to file a joint return and the Tax Court accepted his determination.

The authority for filing joint returns is given in 1939 Code Section 51(b)(1) (Appendix, *infra*) which provides merely that "A husband and wife may make a single return jointly." The Tax Court held that the question of whether persons are husband and wife within the meaning of Section 51 must be determined by state law. The taxpayer agrees but does not accept the Tax Court's interpretation of Caalifornia law.

Taxpayer criticizes "the literal rigidity" with which the Tax Court has interpreted the applicable provisions of California law. (Br. 37.) He also asserts that Congress did not intend to limit words "husband and wife", as used in 1939 Code Section 51, to spouses whose status has "the greatest degree of validity under local law" (Br. 32) but intended to make joint returns available "without regard to the niceties of local law" (Br. 41). We can not agree. The applicable provisions of California law are written in such plain and concise language that they should be and have been repeatedly interpreted and applied strictly as written. Moreover they require the decision reached here by the Tax Court as related to Code Section 51.

Section 90 of the California Civil Code (Appendix, *infra*) states that marriage can be dissolved only by death of one of the parties or by the judgment of a court of competent jurisdiction decreeing a divorce of the parties. As we shall point out below, that means a final decree, not an interlocutory one, and

under the facts here it also means that the only court having competent jurisdiction is one in California. As to remarriage, Section 61 (Appendix, *infra*) provides that a *subsequent marriage* contracted by any person during the life of a former husband or wife is *illegal and void from the beginning unless the former marriage has been annulled or dissolved;* and that *in no case can a marriage of either of the parties, during the life of the other, be valid in California if contracted within one year after entry of an interlocutory decree of divorce.*

Section 131 of the California Civil Code, in providing for the entry of an interlocutory decree in a divorce action, states that after entry of such decree neither party shall have the right to dismiss the divorce action without the other's consent; and Section 132 provides that "when one year has expired after the entry of such interlocutory judgment" the court may enter "the final judgment granting the divorce." (Appendix, *infra.*) Section 132 also provides that *the final judgment shall restore the parties to the status of single persons and permit either to marry after the entry thereof*, but it explains that if either should die before the entry of final judgment, *the entry of that judgment shall not validate any marriage contracted by either party before the entry of such final judgment* nor constitute any defense of any criminal prosecution made against either.

A further provision applicable here is Section 150.1 of the Civil Code (Appendix, *infra*). That section provides that *a divorce obtained in another jurisdiction shall be of no force in California if both parties*

to the marriage were domiciled in California at the time the proceeding for the divorce was commenced. As we have pointed out, the parties admit that Albert was domiciled in California all during 1950, which means he was not only domiciled there when Lucille filed her divorce action against him but also domiciled there when he obtained a divorce in Mexico and was married there. Thus if the clear language of Section 150.1 is followed here, it is evident that Albert's Mexican divorce should be given no force and effect in California. Moreover, as his Mexican divorce and marriage occurred less than a year after the entry of the interlocutory decree in California, it is contrary to Sections 61 and 132, *supra*, and should also be held invalid under those sections.

In contending otherwise, taxpayer relies primarily on the recent decision in *Spellens* v. *Spellens*, 49 A.C. 213. In that case, the plaintiff was married to her alleged second husband in Mexico four days after the entry by a California court of an interlocutory decree of divorce from her first husband. The plaintiff asked that her second marriage be declared valid and that her second husband, from whom she was then separated, be required to furnish support and maintenance. The second husband contended that he was not liable for the plaintiff's support because their marriage had been contracted before the entry of the final divorce decree and was void for that reason. But the Supreme Court of California said that he was estopped from making such a defense and pointed out that the validity of a divorce decree can not be contested by a party who has married in reliance thereon or has aided another to procure the decree so that the latter

will be free to marry. Consequently, it was held that he was not in a position to deny support and maintenance to the plaintiff. That does not mean that the court found that the plaintiff's second marriage was valid. Indeed it refused to do so, for it said (p. 222):

> The theory is that the marriage is not made valid by reason of the estoppel but that the estopped person may not take a position that the divorce or latter marriage was invalid. * * *

Then, in explaining its position further, the court stated immediately following the long excerpt from which taxpayer quotes (Br. 35-36) that (pp. 223-224):

> The foregoing authorities involved an estoppel to deny the validity of a decree invalid because of lack of jurisdiction of the court which purported to grant it but we think the same policy requires the same result in the instant case where there was a marriage before a year after the entry of an interlocutory decree. The policy applies equally in one case as the other. The policy against a bigamous marriage expressed in the first sentence of section 61 of the Civil Code, *supra*, involved in the cited cases, is no stronger nor more compelling than that involved here which is that there may not be a valid marriage if contracted within less than a year after the entry of an interlocutory decree of divorce. (Civ. Code, § 61, subd. 1, *supra.*) We fail to see any difference in this case and one where defendant had participated in the obtaining of an invalid Nevada or Mexican divorce rather than a California interlocutory decree. *It is not the marriage which is found valid as indicated by the above*

> *authorities and thus the policy of section 61, subdivision 1, is not thwarted. Rather it is that defendant by reason of his conduct will not be permitted to question its validity or the divorce;* so far as he is concerned, he and plaintiff are husband and wife. The interlocutory decree declared that the parties were entitled to a divorce and it was not unreasonable for plaintiff to have been led to believe that a marriage in Mexico would be valid. The circumstances here clearly show fraud and estoppel as far as the defendant is concerned; it would be difficult to imagine a stronger case in this field of law.
>
> It may be noted also that we are not recognizing a common-law marriage which does not exist in this state for *the theory is that the marriage is not validated; it is merely that defendant* cannot contest it. * * * (Italics supplied.)

We think it is obvious that the *Spellen* case is not applicable here and that it should be followed only in situations where one party to the second marriage is attempting to take advantage of the other. In such a situation, the Supreme Court of California has said that public policy requires that the doctrine of estoppel be applied to prevent an inequitable result. But in this case we do not have a comparable situation. Not only is the Commissioner free to consider whether Albert and his alleged second wife are validly married but, as the Tax Court held, he is required to do so, and there are many California decisions which support the position taken by the Commissioner and the Tax Court as to the invalidity of Albert's second marriage.

The principle which we think should be applied

here was well stated years ago in *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320, in which it was said (pp. 53-54):

> It is the final judgment that grants the divorce. The interlocutory judgment does not have that effect. It merely declares the right: that the party is "entitled" to a divorce, a divorce to be afterwards adjudged. By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the *status* of single persons, and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the mean time the parties remain in the legal relation of husband and wife. * * *

The above principle has frequently been applied by the California courts in varying situations. For example, in *Brown* v. *Brown*, 170 Cal. 1, 147 Pac. 1168, the first wife was allowed to recover certain property from the second wife after the death of their husband, because it had been acquired by him while the interlocutory divorce decree was still in effect and so was community property obtained before the first marriage relation was severed. The same conclusion was reached under similar circumstances in *Berry* v. *Berry*, 140 C.A. 2d 50, 294 Pac. 2d 757. In *Paulus* v. *Bauder*, 106 C.A. 2d 589, 235 Pac. 2d 422, a wife was not allowed to sue the husband in tort after the entry

of an interlocutory divorce decree and before entry of the final decree because it was held they were still married. And in *Estate of Seiler*, 164 Cal. 181, 128 Pac. 334 it was held that, although an interlocutory divorce decree had been entered, the woman whose estate was involved there was still married to her husband at the time of her death and for that reason the latter had a prior right to administer her estate.

The Tax Court's interpretation of California law is in accord with that of this Court in *United States* v. *Holcomb*, 237 F. 2d 502, affirming *per curiam*, 137 F. Supp. 619 (N. Cal.), and *Commissioner* v. *Ostler*, 237 F. 2d 501. In each of those cases the Commissioner took the position that, during the period between entry of the interlocutory divorce decree and entry of the final decree, the spouses were not "husband and wife" within the meaning of 1939 Code Section 51 and could not file joint income tax returns, but this Court held otherwise.[7] This Court stated that its decision in the *Holcomb* case was based on the reasons advanced in the District Court's opinion. These are set forth in the following excerpts (pp. 619-620):

> Admittedly the parties herein were not divorced in 1951. It is elementary that in California an interlocutory decree of divorce does not destroy the marriage. *Brown* v. *Brown*, 170

[7] In view of this Court's decisions in the above cases the Commissioner has now issued a ruling stating that a husband and wife who are separated under an interlocutory decree retain the relationship of husband and wife until the divorce decree becomes final. See Rev. Rul. 57-368, 1957-32 Int. Rev. Bull. 23 (Appendix, *infra*).

> Cal. 1, 147 P. 1168. Nor were they legally separated by what is commonly known as a decree of separate maintenance. * * * Defendant however contends that the section in question also applies to persons who, while still legally married for other purposes, were "legally separated * * * under a decree of divorce". This contention has been made before and has been rejected. The identical issue was raised in *Marriner S. Eccles* v. *Commissioner of Internal Revenue*, 19 T.C. 1049, affirmed, 4 Cir. 208 F. 2d 796, which held that since an interlocutory decree under Utah law did not dissolve the marriage, a joint return was proper. In the case of *William G. Ostler* v. *Commissioner*, Docket No. 52185, T.C. Memo 1955—207, filed 7/25/55, the same result was reached on the same issue under California law.

In the *Ostler* case, this Court pointed out (as did the District Court in the *Holcomb* case) that Code Section 51 had been interpreted in the same way in *Commissioner* v. *Eccles*, 208 F. 2d 796 (C.A. 4th) [involving an interlocutory divorce decree by a Utah court], and in *Commissioner* v. *Evans*, 211 F. 2d 378 (C.A. 10th) [involving an interlocutory decree by a Colorado court]. In view of these decisions and the specific provisions of the California Civil Code, we submit that the Tax Court correctly decided that Albert and his alleged second wife were not entitled to file a joint return for the year involved here.

CONCLUSION

The decision of the Tax Court on both issues is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

* * * *

(b) [as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] *Husband and Wife.*—

(1) *In general.* — A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a jointly return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * *

(26 U.S.C. 1952 ed., Sec. 51.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.* — Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * *

(26 U.S.C. 1952 ed., Sec. 112.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(c) *Distributions in Liquidation.* — Amounts distributed in completed liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 115.)

California Civil Code, West Annotated California Codes (1954[8]):

SEC. 61. *Bigamous and polygamous marriages; exceptions; absentees*

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such

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[8] Although the above sections of California law are taken from the 1954 edition of the Civil Code all of the provisions given were in effect prior to 1950, the taxable year here.

former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annuled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

*　　*　　*　　*

SEC. 90. *Methods of dissolution*

Marriage is dissolved only:

One—By death of one of the parties; or

Two—By the judgment of a Court of competent jurisdiction decreeing a divorce of the parties.

SEC. 131. *Decision and conclusions; interlocutory judgment*

In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce; and the court may, in its discretion and regardless of whether or not a request therefor was included in the prayer of the complaint, restore the maiden name of the wife or the name under which she was married. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other.

SEC. 132. *Final judgment; one year waiting period*

When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

SEC. 150.1 *Foreign divorce of parties domiciled in state; effect*

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

SEC. 150.2 *Domicile, prima facie evidence*

Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another

jurisdiction was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this State and until his return maintained a place of residence within this State, shall be prima facie evidence that the person was domiciled in this State when the divorce proceeding was commenced.

Rev. Rul. 57-368, 1957-32 Int. Rev. Bull. 23:

SECTION 51(b).—INDIVIDUAL RETURNS: HUSBAND AND WIFE

* * * *

In the light of the decision in *Commissioner* v. *William G. Ostler*, 237 Fed. (2d) 501, reconsideration has been given to the issue involved in I. T. 3761, C. B. 1945, 76; I. T. 3934, C. B. 1949-1, 54; I. T. 3942, C. B. 1949-1, 69; I. T. 3944, C. B. 1949-1, 56; and Revenue Ruling 55-178, C. B. 1955-1, 322, and the nonacquiescences by the Internal Revenue Service in the decisions in *Marriner S. Eccles* v. *Commissioner*, 19 T.C. 1049, affirmed 208 Fed. (2d) 796; and *Alice Humphreys Evans* v. *Commissioner*, 19 T.C. 1102, affirmed 211 Fed. (2d) 378, C.B. 1953-2, 8.

Each of the income tax rulings referred to in the proceding paragraph involves the question of whether payments made pursuant to an interlocutory decree of divorce by a husband for the support of his wife are includible in the gross income of the wife under section 22(k) of the Internal Revenue Code of 1939 and deductible by the husband under 23(u) of such Code. The court decisions involve the question of whether a

taxpayer and his former wife are entitled to file a joint income tax return for a certain taxable year, notwithstanding the fact that prior to the end of such year, they were legally separated under an interlocutory decree of divorce.

I.T. 3761, *supra*, holds that periodic payments made pursuant to an interlocutory decree of divorce in the State of California by a husband for the support of his wife are includible in her gross income under section 22(k) of the Internal Revenue Code of 1939 and deductible by the husband under section 23(u) of such Code. The parties were considered divorced or "legally separated" for the purpose of section 22(k) of the Code, and the payments made pursuant to the interlocutory decree which awarded alimony for an indefinite period of time were considered periodic payments.

I.T. 3934, *supra*, holds that where the time for making payments of alimony under an interlocutory decree of divorce in the State of California is limited to the duration of the decree (12 months), the payments made pursuant to the decree do not qualify as "periodic payments" under section 22(k) of the Code and are not deductible from the gross income of the husband under section 23(u) of the Code. I.T. 3761, *supra*, was modified accordingly.

I.T. 3944, *supra*, holds that payments to be made for a definite period of time shall be considered to be "installment payments" and not "periodic payments" within the meaning of section 23(k) of the Code. Therefore, since I.T. 3761 and I.T. 3934, *supra*, are distinguishable, the modification of the former ruling was withdrawn.

I.T. 3942, *supra*, holds that the parties named in an interlocutory decree of divorce in the State of California are considered, for Federal income tax purposes, to be legally separated for the purposes of sections 25(b) and 51(b) of the Code. Revenue Ruling 55-178, *supra*, also holds that an interlocutory decree of divorce may effect a legal separation under a decree of divorce or of separate maintenance under section 23(k) of the Code.

In William G. Ostler, *supra*, the court held that an individual and his spouse who were separated under an interlocutory decree of divorce retained the relationship of husband and wife until the decree became final and were entitled to file a joint return of income under section 51(b) of the Internal Revenue Code of 1939. Similar decisions were reached in *Marriner S. Eccles* v. *Commissioner*, 208 Fed. (2d) 796, nonacquiescence C.B. 1953-2, 8; *Alice Humphreys Evans* v. *Commissioner*, 211 Fed. (2d) 378, nonacquiescence C.B. 1953-2, 8; *United States* v. *William F. Holcomb and Adris M. Holcomb*, 237 Fed. (2d), 502; *Joyce Primrose Lane* v. *Commissioner*, 26 T.C. 405.

Due to the adverse decision in the William C. Ostler case, the Internal Revenue Service now withdraws the nonacquiescences and substitutes acquiescences in the Marriner S. Eccles and Alice Humphreys Evans cases. See page 7 of this Bulletin. For the same reason the following rulings, referred to above, are revoked: I.T. 3761, I.T. 3934, I.T. 3942, I.T. 3944 and Rev. Rul. 55-178.

The cases and income tax rulings cited above relate to the Internal Revenue Code of 1939.

Under the provisions of the Internal Revenue Code of 1954 a husband and wife who are separated under an interlocutory decree of divorce retain the relationship of husband and wife until the decree becomes final and are entitled to file a joint return of income in the same manner as they were entitled to file such a return under the 1939 Code. Under the 1954 Code, however, where the husband and wife are living apart and file separate returns, payments made during the period covered by the interlocutory decree may constitute periodic payments taxable to the wife and deductible by the husband.

The revocation of I.T. 3934 I.T. 3944, above, does not affect the question of whether payments limited to the duration of an interlocutory decree of divorce are periodic payments for the purposes of section 71(a)(3) of the Internal Revenue Code of 1954.

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